Supreme Court, U.S.
FILED

No. 03 206 JUN 9 - 2003

In The

Supreme Court of the United States

In Re: Summary Judgement of Retaliation/Race Discrimination Case

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KELVIN J. HURDLE,
Petitioner.

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

1. Is the right to due process denied the plaintiff possessing a right to sue letter for discrimination; when summary judgment is granted base on preclusive effect & collateral estoppels for discrimination, and the issues was never tried in a Federal or State Court?

2. Can full faith and credit be given to a grievance hearing where the hearing officer clearly see and documents in the record, that the evidence of the employers testimony is conflicting along every line of questioning, and still rules in favor of the employer?

3. Does a claim of retaliation, filed originally in the Federal Court, have priority jurisdiction over a grievance step of an administrative judicial review? Additionally, should an administrative judicial review of retaliation, ordered by the Federal Court, preclude the plaintiff's rights to litigate his discrimination complaint in Federal Court?

4. Should preclusive effect be granted to a grievance step of judicial review in Virginia; when Virginia law only gives preclusive effect to complaints actually tried or determined on the merits in a state court? Additionally, if the Federal Court allowed the continuance of a Title VII retaliation case, and ignored a motion for dismissal base on collateral estoppel of a grievance hearing; should that Federal Court stay the existing federal procedures and order the plaintiff to proceed with the administrative step of judicial review as motioned and requested by the defendant? Should that Federal Court subsequently deny the plaintiff the right to proceed with his complaint in Federal Court by reason of collateral estoppel?

PARTIES TO THE PROCEEDING

Petitioner:

Kelvin J. Hurdle,

Respondent:

Virginia Department of Environmental Quality,

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The opinions of the United States Court of Appeals for the Forth Circuit in Kelvin J. Hurdle, Plaintiff-Appellant, versus The Commonwealth of Virginia, Department of Environmental Quality, Defendant-Appellee Case No. 02-?138 are unpublished. Copies of the Opinions are included in the Appendix at Appendix page 1a. The Orders of the District Court for the Eastern District of Virginia are included in Appendix at Appendix page 3a.

JURISDICTION

The United States Court of Appeals for the Forth Circuit filed its Mandate on the judgement entered by the court on 12/19/02. A timely filed Petition for Rehearing and Rehearing En Banc was denied on March 11, 2003 (Appendix 5a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The court's jurisdiction is invoked pursuant to 28 U.S.C §§ 1254 (1) and 2106.

STATUTORY PROVISIONS INVOLVED

This action is brought on behalf of Kelvin J. Hurdle seeking to implement the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. This Court has subject matter jurisdiction pursuant to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S. C. § 1343 because this action seeks redress and damages for violation of 42 U.S.C. § 1983 and 1985, and in particular, the due process and equal protection

provisions of the United States Constitution, including the rights protected in the Fifth, Seventh Ninth and Fourteenth Amendments.

This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

Venue is appropriate in this judicial district under 28 U.S.C. § 1391 (b), because Defendant is a state agency functioning in Richmond, Virginia, and a substantial part of the events giving rise to this Complaint occurred in Richmond, Virginia. Defendant the Department of Environmental Quality is a state agency maintained and funded in significant part by the Commonwealth of Virginia.

STATEMENT OF THE CASE

Hurdle is an African-American male that has made several attempts to obtain an attorney [Appendix 7a]. The one attorney that Hurdle obtained, after over 10 different consultations, worked on the case for 3 weeks and then refunded the total 5,000.00 retainer declaring that the decision for the Federal Complaint case has already been made.

Hurdle was employed by DEQ since 1988, and was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training and Development-Manager ("TD Manager"). Hurdle participated in protected activity from December 1999 through December 2000. On January 21, 2001 Hurdle was terminated for allegedly not meeting the minimum expectations in any category of his job performance. Hurdle filed an administrative

grievance for arbitrary and capricious performance evaluation given in retaliation. Hurdle's attorney for the grievance, never attempted to prove any part of the framework for retaliation and got angry when Hurdle requested such an action. Hurdle received a right to sue letter for discrimination and retaliation January 23, 2001 and filed for, and obtained an amended right to sue letter for retaliation and discrimination September 2001. To implement the administrative process that includes the judicial review, Hurdle filed an administrative grievance that took placed May 31 and June 1, 2001. Hurdle filed for the judicial review July 2001. The Department of Environmental Quality ignored and failed to timely respond and submit the grievance records to the State Court. Hurdle then filed his amended complaint in Federal Court August 1, 2001 to pursue his claim of retaliation, hostile work environment and discrimination. In September of 2001, the Federal Court issued an order-instructing Hurdle to pursue the judicial review of the administrative process, upon the motion of DEQ. Hurdle contended that such a pursuit was a waste of time but followed the court's order. The State Court upheld the hearing officer's decision. The Federal Court continued the Federal Case and allowed discovery and depositions to be taken. Motions were filed for summary judgment by DEQ and in opposition to summary judgment by Hurdle. A prima facie case was shown and proven by Hurdle for retaliation, discrimination and a hostile work environment. The Federal Court granted Summary Judgment for DEQ on the grounds of preclusive effects of the state court judicial review that was not performed on the merits or exactly the claims file for in the Federal case. The

issues of discrimination or retaliation were not tried in the state court. The preclusive effect given to the judicial review of the grievance hearing is in conflict with Virginia Law and previous cases that have been ruled upon by the United States Supreme Court. Moosavi v. Fairfax County Bd. Of Educ., 666F.2d 58 (1981). Haring v. Prosise, __US__,103 S. Ct. 2368, 76 L.ED.2d 595 (1983)

Additionally, neither the discrimination issue nor the hostile work environment issue filed in Hurdle's Federal complaint was ever a part of the administrative grievance that had an administrative judicial review. Therefore, the administrative grievance should not be given preclusive effect, as clearly noted by Virginia Law and as indicated by the previous cases ruled upon by the United States Supreme Court. Allen v. McCurry, 449 U.S at 96, 101 S. Ct at 415-418 n.7 Patsy v. Florida Board of Regents, 457 U.S. 496, 501-502, 512-513,and n.13 102 S.Ct 2557 2560-61,2567, and n.13 73 L.Ed.2d 172 (1982)

REASONS FOR GRANTING THE PETITION

The Appropriateness of Defendants' Motion for Summary Judgment. DEQ'S motion for summary judgement is only appropriate if there is no genuine issue as to any material fact, which would entitle defendant to judgement as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact. The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Hurdle since he is the party opposing the motion. Ross, Id., at 364. Only where it is

"perfectly clear that there are no issues in the case" is summary judgement proper. As the nonmoving party, Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364.

Federal Rule of Civil Procedure 56(C) required that the Court enter judgment against a party who, "after adequate time for discovery ... fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp.v. Catrett, 477 U.S. 317,322 (1966). The essence of the inquiry that the Court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 77 U.S. 242, 251-52 (1986). Summary judgement is proper "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." Id., at 248

Hurdle is entitled to a trial by jury for his Title VII claims of discrimination, hostile environment and retaliation. Hurdle clearly expressed in open argument September 6, 2002 that the hostile work environment, Title VII discrimination, or several of the issues of retaliation or were never apart of the original grievance and therefore not a part of the judicial review Appendix [10a-12a]. Hurdle requested a jury trial in

the filing federal complaint for the Title VII claims. However, by a request motion of the defendant and order of the federal court, Hurdle was required to proceed to the time barred administrative step of judicial review. Subsequently, the Federal Court has given the grievance hearing held between Hurdle and DEQ preclusive effect because the decision was reviewed by a State Court of Virginia. Hurdle has been denied the right to a trial by jury for his Title VII claims. Hurdle's constitutional rights to Due Process and Equality Under the Law have also been denied.

Congress expressly recognized in both §706 (b) and §706 (c) that a complainant could bring a Title VII suit in federal court despite the conclusion of a state "proceeding." As Justice Blackmun has written in Kremer v. Chem, 456 U.S. 461 (1982), "The Court must acknowledge, see ante, at 470-471, n.8, when Congress referred to state "proceedings", it referred to both state agency proceedings and state judicial [Page 489] review of those agency proceedings". "For a State Court review is merely the last step in the administrative process, the final means of review of the state agency's decision".

The Fourth Circuit had no difficulty distinguishing a state court trial on a discrimination claim from [page 496] state court affirmance of state agency's determination. Moosavi v. Fairfax County Bd of Education. 666 F2d 58 (1981). Unless and issue was actually litigated and determined in a formal judicial proceeding, Virginia law will not treat it as final. See e.g. Luke Construction Co. v. Simpkins, 223 Va. 387, 291 S.E.2d. 204 (1982). Eason v. Felson, 442 U.S. 127, 139, n.10, 99 S. Ct 2205.2213 n.10, 60 L Ed2d 767 (1954)

Haring v. Prosise, __U.S. __, 103 S. Ct. 2368, 76 L.ED.2d 595 (1983). To render the judgment conclusive, it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined. That is, "that the verdict could not have been rendered without deciding that matter." Cf Block v. Commissioners, 99 U.S. 686, 693, 25 L.Ed. 491 (1879); Segal v. American Tel. &Tel Co. 606 F.2d 842, 845. n2 (CA 1979).

The administrative grievance held at the Department of Environmental Quality (DEQ) should not be given "Full Faith and Credit" and therefore not given preclusive effect. The Hearing Officer/Commissioner clearly observed and denoted flags of inconsistency in DEQ responses in every direction of questioning, (Def. Encl. X pg. 110 line 14-15). [Appendix 8a] Montana v. United States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979). The hearing officer did not address the respective facts in his opinion and ruled for DEQ despite the inconsistency is DEQ answers of questions. Additionally, the hearing officers' denied Hurdle due process when he refused to allow seven exhibits into the record. Full faith and credit can only be given after the plaintiff is allowed to present all exhibits in the entirety. Montana v. United States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979) Hurdle wasn't allowed the respective opportunity. Moreover, the Hearing officer spoke harshly to Hurdles attorney and said either you (the attorney) are going to represent Mr. Hurdle or he will have to represent himself (Def. Encl. X pg.6 line 18-19). Unfortunately, Hurdle has been forced to represent

himself. Hurdle has found no attorney willing to stand up for Hurdle rights to the law in the fourth circuit. Appendix [7a]

The proceedings involve two question of critical importance:

I.a. Can preclusive effect be given to issues not properly before the administrative hearing or the administrative act of judicial review? Discrimination or Hostile Environment was not before the grievance hearing administrative law judge and therefore not before the Richmond Circuit Court. Haring v. Prosise _ US __,103 S. Ct. 2368 76 L.ED.2d 595 [1983]

b. Does Federal Court have precedent over a state court when a Title VII action is filed first in Federal Court and the plaintiff clearly states that he prefers to proceed in Federal Court? Is it appropriate for the District Court to stay the procedures of Federal Court to initiate a judicial review State Court action at the request of the defendant and in opposition to plaintiff request? Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

II. Prima Facie Case

Kelvin Hurdle ("Plaintiff") submits the following responses to establish a prima facie case in the respective case.

Harassment Claim

There is no dispute that Hurdle experienced verbal abuse from Howard Freeland (Encl.XXXVII S. Beverly. 336. trans.hearing pg. 28 lines-15-16) (Encl. XXII.pg. 22 line 13-14) He also experienced disparate treatment as clearly described in the denial of access to the job during the audit (Def.Encl.X.Exh. #19.1of 1) and relative to the discussions of Page County groundwater flow (Encl XXXIII) (Encl.X.Exh. #24.10&11of112). Additionally, the reports by Lawrence Farmer relative to the alteration of work documents, more than adequately prove workplace sabotage (Exhibits XVI and XVII). Verbal abuse, disparate treatment, and workplace sabotage definitely support a harassment claim. (Raniola v Bratton, 2nd Cir, 81 EPD ¶ (40,706). All positive inference of the respective facts is to be viewed in the most favorable light of the Plaintiff and thereby summary judgment should be denied and a trial date set. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

Retaliation Claim

a. Treacy re-assigned Paylor as the Ultimate Decision Maker with respect to Hurdle (Encl XXVI pg.9 line 13-20) and Treacy made Karen Sismour aware of Hurdle's participation in protective activity (Treacy Depo Encl. XXV1 pg.8 lines 9-18,)

b. (Paylor Depo Encl XXX pg.9 lines 5-7, and pg.39 lines 18-19) Paylor testifies that Ms. Karen Sismour was the Ultimate Decision Maker (Paylor Depo Encl. XXX pg. 54 line 1-25)

c. Ms. Romanchik signs sworn affidavit that she recommended that Hurdle be terminated. (Def. Encl. IV para.12)

d. They all took part of the group decision that left Ms. Sismour standing as the Ultimate decision-maker that sign off on the recommendation for terminating Hurdle without **an independent investigation**.

(Def.Encl.X.griev.tr.pg 284 line 6-12) Paylor refuse to cover the performance issues with Hurdle point by point as requested by e-mail (Paylor Depo.Pg.12 lines 1-12) (Paylor exhibit 5) and thereby refuse to do an **independent investigation** of the performance issues.

Paylor knew that there were some management issues that needed to be addressed as well as communication problems. (Paylor 336 Depo pg. 30 lines 15-25 and pg. 31 lines 4-6) (Paylor encl. XXII pg.20 lines 4-15).

e. Romanchik recommended terminating Hurdle and boastfully expressed halted that did not call or check with anyone about the validity of the alleged customer service complaints when questioned by Mr. Scott Crowley. (Def.Encl.X Romanchik griev. tr page 83 lines 15-22) Romanchik never performed **an independent investigation.**

f. Ms. Sismour terminated Hurdle knowing that there were communication problems and did not perform an independent investigation but simply accepted evidence as it was presented to her. (Sismo Depo.pg. 4 lines 1-3 and lines 8-10)

g. Evidence in the record clearly shows that documents were being changed and even Hurdle signature on work documents were being signed by someone within the organization other than Hurdle. (Enclosure XVI)

h. Treacy, Paylor, Sismour, Freeland, Romanchik, and Syverson were all aware of Hurdle participation in protected activity. (Def.Encl.X. griev.tr.pg. 284 line 6-12)

DEQ management participated in the shell game with respect to the ultimate decision-maker. Such actions infer causation with respect to the ultimate decision-maker in a retaliation case (Willis, 118F.3d at 547). Paylor was assigned the Ultimate decision making responsibilities and didn't respond to Hurdle's request to review his performance point by point. (Paylor Depo Encl. XXX pg. 12.ln 10-12). Paylor states that he was not the ultimate decision-maker, and that Karen Sismour was. (Paylor Depo 06/02). Proof of such manipulation in decision-making is adequate to show intent to retaliate (Willis, 118F.3d at 547). They all met conversed with Karen Sismour (Def.Encl.X griev hr.tr.pg 284 line 6-12) and terminated Hurdle because of participation in protected activity. The panel of Treacy, Paylor, Sismour and Romanchik, decided to terminate Hurdle without any independent investigation. They all acted as the supervisor's cat's paw. Therefore, the innocence of the panel members(Treacy, Paylor, Sismour, and Romanchik) should not spare the agency from liability and thereby establishing a causal link. [Shager v Upjohn Co, 913 F.2d 398, 405 (7th Cir.1990)], (Willis, 118F.3d at 547) and Azzaro v. County of Allegheny, 110 F.3d 968, 973-74 (3d Cir. 1997). These actions would not have occurred against Hurdle if he had not participated in protected activity and therefore the respective retaliatory acts have occurred.

Additionally, Hurdle requested Mr. Paylor (Deputy Director) respond to the details of the Appeal of Hurdle's performance evaluation. No ultimate decision-maker or relevant decision-maker did an independent investigation as to Hurdle's performance evaluation. Additionally, Mr. Hurdle improved in his performance from September 1999 until September 2000 but his ratings were marked lower in September 2000 after he filed a retaliation lawsuit in May 2000. These actions would not have occurred against Hurdle if he had not participated in protected activity and therefore the respective retaliatory acts have occurred.

All the respective managers knew that there were management issues that needed to be addressed and that there were communication problems (Paylor encl. XXII pg.20 lines 4-15). They all were aware that Hurdle had participated in protected activity Paylor testimony (Treacy Depo encl. XXV1 pg.8 lines 9-18 and pg.39 lines 18-19); Treacy testified that he communicated to Sismour about Hurdle's grievance of the comp time issue which occurred before Hurdle obtain the right to sue on February 9, 2000 (Treacy Depo encl. XXV1 pg. 39 lines 13-18). Paylor and Romanchik were present in a meeting where Hurdle spoke out against racial discrimination December 1999. After Hurdle received the right to sue in February 9, 2000. Freeland testified that he began a strict scrutiny of Hurdle's performance in February 2000 (Def. Encl. X. griev. tr.pg.176 line 20-25 and pg.177 lines 1-6). If it had not been for the receiving of the February 9, 2000 right to sue letter, the May 12 filing of a grievance, or filing the May 29, 2000 discrimination lawsuit, Hurdle would not have been giving the failing interim

evaluation May 31, 2000 or the "Does Not Meet Expectations" in every job element in September 2000. Additionally, Hurdle would not have been placed on a 90-day re-evaluation plan that determined that Hurdle did not meet the 4-hr maximum requirement in response to draft letters. Hurdle met the 4-hr maximum requirement during the normal evaluation period. If it had not been for Hurdle filing grievance for fraudulent activity and participating in court procedures, Hurdle would not have received an unwarranted Group II Notice on October 21, 2000 for an action that occurred October 3, 2000. When Syverson was asked why didn't he issue the group II notice sooner, he replied that he didn't know. If Hurdle had not participated in the court procedures December 11, 2000; He would not have been terminated January 16, 2001.

Discrimination

The Defendants defense of unsatisfactory performance is a sham and is not supported by the record. Additionally, discriminatory practices, such as the fraudulent changes of documents, have rendered the record mis-leading and the record itself is a mere pretext for discrimination. Hurdle was required to handle more than twice the workload as whites similarly situated between the annual report periods of March 1, 2000 to July 5, 2000. (Griev. tr.pg. 90 lines 3-6) (griev. tr.pg. 96 lines 1-4). Freeland testified that any errors made in 2000 were not worst than the errors made in 1999. (griev. tr.pg. 179 lines 8-20) Hurdle rating in 1999 was meets expectations (1999 Performance Evaluation), but was does not meet the minimum expectations in 2000 even though Hurdle

improved and was meeting the four hour time limit expectation. Leslie Romanchick testified that even if Hurdle had excellent quality in his work, he probably wouldn't have received and excellent rating (griev. tr.pg. 110 lines 8-12). She testified that quantity wasn't an issue. Romanchick testified that Hurdle had more than twice the sites than other white employees had with one or two year's experience. (Griev. tr.pg. 90 lines 3-6) (Griev. tr.pg. 96 lines 1-4). Paylor's alleged review of the performance evaluation could not distinguish a technical v. non-technical error. (Paylor Depo. pg. 24 line 5-8) Hurdle was told he would only be accountable for technical errors (Freeland griev.tr.pg. 134 line 8-10) The Hearing Officer/Commissioner commented with respect to Ms. Romanchick's depositional answers that there were contradictory flags in every direction. (Hearing Officer Page 110 lines 14-15). Hurdle was denied the same opportunity granted the whites similarly situated that had seniority. (Hurdle Depo). Hurdle was given complex sites during the initial job assignments where whites similarly situated were not. Hurdle complained about inadequate training (Paylor Exhibit), intentional mis-communications (Appeal of Performance Paylor Exhibit) and fraudulent moving of documents. (Farmer Enclosure XVI). Thus proving that any unsatisfactory performance is attributable to the (Defendant) DEQ, rather than any inherent inadequacy of the Plaintiff. Whites similarly situated with poor performances have been found jobs (Peggy Hawkins Affidavit #2). Hurdle was the only employee ever terminated using DPT policy 1.40 Performance Evaluation. (Defendant Answer to Interrogatory 14). Other white employees with similar records have been more leniently treated,

thus indicating that the record itself is not the true basis for the particular treatment (Joe Shelton Affidavit Paylor Exhibit).

Hurdle should have been allowed access to the office as whites similarly situated. The fact that Hurdle was not allowed in the office during the audit, clearly show that Hurdle was treated differently that the whites similarly situated. Whether after hours access would have enhanced performance or not, Hurdle was entitle to the same benefits as whites similarly situated. Additionally, Howard Freeland and Geoff Christie who were in the same Solid Waste group, entered the DEQ office building during the audit and was shown by the Sonitrol records. DEQ alleged that the necessary business reason was that the audit was in progress and Hurdle was under investigation, which was the reason that Hurdle was not allowed in the office after hours. The audit was over by mid-October and Hurdle was still not allowed in the office until Mid-December (Encl. XXI) (Syverson e-mail). So the legitimate business reason of the existing file audit is false, and the fact that Freeland and Christie entered the office building during the audit clearly show that race and or retaliation is more likely the reason for Hurdle being denied access to the office building to which he was entitle. Additionally, Freeland was under the same investigation as Hurdle concerning the tracking sheet documents (Enclosure XXXV Dewayne Report) however, Hurdle was denoted as the suspect. Freeland had the freedom to request individual tracking sheets (Encl. XVI) and additionally, was allowed to enter the office building during the respective audit that Hurdle was denied. With the

fraudulent activity of document changing (Encl. XVII) Hurdle needed to work more than a forty-hour workweek.

Hurdle presented evidence that whites "similarly situated" were treated better. White employees faced with similar management decisions were treated differently. One white male similarly situated maintained his job. (Peggy Depo pg. 26 line 20-25) (Peggy Affidavit#1). The white male similarly situated was made aware that he would be terminated one day before the termination and HRO found another job within a one-day notice. (Peggy Affidavit #2Def.EnclVIII). The Defendant Alleged that the white male somehow found out he was going to be terminated one day before the scheduled event. Some how this information leaked out to him one day before termination. Because Hurdle was Black, such information didn't leak.

DEQ wrongly terminated Mr. Hurdle as contracted by the Virginia DEQ Employee Handbook. The Virginia DEQ Employee Handbook is generally distributed to all employees and Hurdle had to sign for his handbook in the presence of Carol Harris. No other white non-protected employee has been terminated under DEQ Policy 5-1 or DPT 1.40 Performance Planning and Evaluation. If it was not for Hurdle's race Black. He would have been disciplined under DPT 1.60 Standards of Conduct for inadequate performance as all other whites before him. Inadequate performance under policy 5-1 is a Group I Offense that does not warrant termination.

DEQ elected to implement DPT policy 1.40 VI.D.1 to look for Hurdle another job within the agency (Sismour.griev.hear Pg. 284 lines 23-25). The policy states that at the end of the next two months if no jobs are available or DEQ has elected not to place Hurdle in another job, then he should be removed from state service. DEQ did not follow the written policy and chose to terminate Hurdle immediately after the 90-day re-evaluation period even when they implemented the option. These retaliatory actions would not have occurred against Hurdle if he had not participated in protected activity.

The fact-finding order (Paylor Exhibit 11) [Appendix 8a-9a] clearly denotes what the facts are in qualifying the respective grievance for hearing. The grievance qualified for a hearing based on the implementation of the Standards of Conduct Policy (Appendix 10a-12a). The qualification for the hearing was not based on the Performance Evaluation Policy and did not include the issue of discrimination (Appendix F]. The state policies should apply to everyone, but the policies are ignored with respect to Hurdle because of Hurdle's participation in protected activity and/or his race Black.

The Agency failed to provide a Developmental Plan for Hurdle required by DEQ policy 5-1 and DPT policy 1.40. The Developmental Plan in accordance to DPT policy 5.05 should involve a need assessment to determine the gap between current and desired performance levels. Additionally, the DEQ violated Mr. Hurdle's rights by violating Chapter 10.01 Section 2.1-116.05 of the Code of Virginia. Montana v. United

States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979)

These actions would not have occurred against Hurdle if he had not participated in protected activity.

Plaintiff has been discriminated against and treated different from whites removed from state service. Hurdle has personal knowledge of DEQ employees that have had 2 group III offenses and still maintained their jobs (Mr. Paul Spaulding). Unsatisfactory Performance is discipline as a Group I Offense. Mr. Hurdle had 11 years of satisfactory work performance. Hurdle and has proven he had all of the skills required for the four various jobs held within DEQ, including two separate classifications of Environmental Engineer Senior under two different supervisors independent of Freeland. If it was not for Hurdle's race Black, and the retaliatory motives of DEQ to terminate Hurdle, he would have maintained his job just as Paul Spaulding, and Cynthia Schrass whom had more than one policy infraction of greater than a Group I Offense and maintained their jobs (Peggy Hawkins Affidavit).

Hurdle was faulted for errors in draft letters. Whites similarly situated made errors in final letters that were mailed to clients. (Freeland Depo Exhibit 4) (Freeland Depo. 22 lines 1-20). Additionally, Whites had backlogged correspondences that didn't require them to produce two letters per day until the backlog was completed. (Freeland Exh. 1" Backlog Correspondence). Surely an inference of retaliation and discrimination can be established from the respective facts. All other staff similarly situated had backlogged correspondence, and some for over a year

and were not required to produce over 117 letters in a 3-month period. [Freeland Depo pg.9 line 21-25& pg. 10 line 4-8). That is evidence by Maria Williams who only had 25 sites and had a backlog of Correspondence over two years. Hurdle was required to complete and answer his respective backlog within 90 days. These actions would not have occurred if Hurdle was not a Black man and the retaliatory motive existed. DEQ never offered a legitimate business reason as to why whites similarly situated never had to completely answer their respective backlogs. Hurdle's sites produced more correspondences than whites similarly situated. DEQ concedes that every site does not equal every other site (Def.Encl.X.Romanchik griev.tr.pg 102 line 14-20).

The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Hurdle since he is the party opposing the motion. Ross, Id., at 364. Only where it is "perfectly clear that there are no issues in the case" is summary judgment proper. As the nonmoving party, Hurdle is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, the most favorable of possible alternative inferences from the evidence drawn in his behalf; and to be given the benefit of all favorable legal theories invoked by the evidence as considered. Ross at 364.

CONCLUSION

Hurdle's claim's of retaliation for participating in protected activity, discrimination and hostile work environment has never been litigated Appendix (10a-12a).

Virginia law clearly does not give preclusion with respect to constitutional claims that have never been litigated. As footnoted in the Haring v. Posises 103 S.Ct, 2377 (1983). "Although petitioners also contends that a special federal rule of preclusion is necessary to preserve important federal interest, we fail to understand how any such interest justify the adoption of a rule that would bar the assertions of constitutional claims which have never been litigated".

Hurdle did not have a full and fair opportunity to litigate his claim or issue in a State or Federal Court.

Appendix 3a-4a. Moreover, Hurdle clearly expressed in open argument September 6, 2002 that the hostile work environment, Title VII discrimination, or several of the issues of retaliation or were never apart of the original grievance and therefore not a part of the judicial review Appendix [10a-12a]. The judicial review was not decided or the merits. Hurdle is entitled to have claims litigated in court and decided on the merits.

Hurdle has shown a prima facie case and has demanded a jury trial with respect to his Title VII claims. Hurdle is entitled to have a trial by jury for his Title seven claims.

WHEREFORE, Mr. Hurdle requests that the Court rescinds and amends summary judgment.

APPENDICES

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2138

KELVIN J. HURDLE,
Plaintiff - Appellant

Versus

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge.
(CA-01-259-3)

Submitted: December 16.2002
Decided: December 19. 2002
[Entered: December 19, 2002]

Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kelvin J. Hurdle, Appellant Pro Se. Martha Murphey Parrish, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Kelvin J. Hurdle appeals the district court's order dismissing his racial discrimination complaint filed in this employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hurdle v. Virginia, No. CA-01-259 (E. D. VA. Sept 25, 2002). We deny Hurdle's motion for appointment of counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE

Plaintiff,

v. CIVIL Action No. 3:01cv259

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

ORDER
[Entered: January 5, 2001]

For the reason set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

[1] the defendant's Motion for Summary Judgment is granted;

[2] Count IV in its entirety, that part of Count I asserting retaliation in respect of opposition to post-employment benefits, and those parts of Count III asserting the intentional infliction of emotional distress and conspiracy, having been abandoned in open Court, are DISMISSED with prejudice;

[3] The remainder of Counts I and III (not dismissed under paragraph [2] above] and the federal claims in Count II are dismissed without prejudice for lack of jurisdiction;

[4] Alternatively, those Counts referred to in paragraph

[3] above are DISMISSED with prejudice by virtue of the doctrine of collateral estoppel;

[5] The state claims in Count II are DISMISSED without prejudice; and

[6] This action is DISMISSED.

This Order may be appealed by the plaintiff. Any appeal from this decision must be taken by filing a written notice of appeal with the Clerk of the Court within thirty [30] days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

The clerk is directed to send a copy of this Order to the plaintiff and counsel for the defendant.

It is so Ordered.

/s/ Robert E. Payne
Robert E. Payne
United States District Judge

Richmond, Virginia

Date: January 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE FORTH CIRCUIT

FILED
March 11, 2003

No. 02-2138
CA–01-259

KELVIN J. HURDLE

Plaintiff - Appellant

v.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY

Defendants - Appellees

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Patricia S. Connor

CLERK

LEGAL AID JUSTICE CENTER
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Richmond, VA 23220

Lynette Woolfolk
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October 7, 2002

Kelvin J. Hurdle
5001 Hallmark Court
Richmond, VA 23234

Re: Kelvin J. Hurdle v. Dept. Environmental Quality

Dear Mr. Hurdle:

It was determined that there was insufficient merit for this office to represent you with your employment matter. Your case file is being close.

I have enclosed your original documents that are being returned to you need additional legal services in the future.

Sincerely,

Lynette Woolfolk
Legal Assistant

[Page 110 from transcript of the grievance hearing Hurdle v. DEQ]

* * *

Q Okay. So in that sense he's responsible for quantity, at this time frame 76?
A But if you look back at the performance standards, it doesn't say complete all, send out a letter on every annual report that's assigned for every facility that's assigned to you. It says review and annual report within four hours and meets the technical criteria.

Q So if he was assigned 76 facilities and he only did one, he did it in four hours and did it perfectly, are you telling me that he would have gotten an excellent evaluation?

A Probably not, but it's not the criteria.

Mr. Crowley: That's all I have.

(Line 14-15) **The COMMISSIONER**: <u>There's a flag in every direction.</u>

Ms. Black: That's all I have.

The COMMISSIONER: One question I had, I can't remember what it was now, -- oh, on the four hour business, is it four hours average? In other words is it expected that in some cases he might do an annual report in one hour others might take six, but on average it should be not more that four?

A No, it's not an average that way, it's an average that sometimes it may take you an hour and sometimes it may take you up to four hours, but it should never take you over for hours.

* * *

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality / No. 2001-13

April 3, 2001

The grievant has requested a ruling on whether his November 17, 2000 grievance with the Department of Environmental Quality (DEQ) qualifies for a hearing. In this grievance, the grievant claims that his 2000 performance evaluation is arbitrary, capricious, and retaliatory. For the reasons discussed below, this grievance is consolidated with the grievant's February 14, 2001 grievance (which has automatically qualified for hearing), and both grievances will be heard together by one hearing officer.

FACTS

In September 2000, the grievant received his 1999-2000 performance evaluation with an overall rating of Does Not Meet Expectations. The evaluation consisted of six job elements upon which the grievant's performance was rated. He received a rating of Does Not Meet Expectations in each of the six categories.

On January 16, 2001, the agency terminated the grievant under the Standards of Conduct for alleged poor job performance. On February 14,2001, the

grievant filed a second grievance challenging his performance-based termination as wrongful, unfair, and retaliatory.

This second grievance, which also involves the grievant's September 2000 performance evaluation, has automatically qualified for a hearing. A hearing on this second grievance has not yet been held.

DISCUSSION

This Department has the authority to consolidate grievances on it own accord and does so when consolidation promotes judicial economy and a more comprehensive understanding of the disputed issues. This is such a case. The issue of the grievant's performance is central to both of his grievances. Thus, the factual issues presented by each grievance are significantly intertwined. Indeed, it may be that the first grievance has now been subsumed by the second. In any event, a hearing officer has already been appointed to determine whether the performance-based termination was warranted and appropriate under the circumstances. It is therefore reasonable under the unique circumstances of this case for the hearing officer to review as well the issue of whether the grievant's September 2000 performance evaluation is arbitrary, capricious or retaliatory.

At hearing, with respect to the February 14, 2001 grievance, the agency will have the burden of proving by a preponderance of the evidence, that the February 2001 termination was "warranted and appropriate under the circumstances." The hearing officer may

either uphold, reduce, or rescind the termination. With respect to the November 27, 2000 grievance, the grievant must prove by a preponderance of the evidence that his September 2000 evaluation was arbitrary, capricious, or retaliatory. If the hearing officer so finds, he may direct the agency to redo the September 2000 evaluation on an objective basis related to the performance expectations in the grievant's performance plan. The hearing officer may not substitute his judgment for that of management by ordering that a specific performance rating be given.

Supreme Court, U.S.
FILED

No. 03 206 JUN 9 - 2003

In The

Supreme Court of the United States

In Re: Summary Judgement of Retaliation/Race Discrimination Case

---

KELVIN J. HURDLE,
Petitioner.

v.

VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI
[Pages 13a to 43a]

Kelvin J. Hurdle
Petitioner Pro-se
5001 Hallmark Court
Richmond, Virginia 23234
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32 pp

SUPPLEMENTAL APPENDIX

Memorandum Opinion of
The United States District Court
For the Eastern District of
Virginia in
Kelvin J. Hurdle v. Commonwealth of Virginia
Department of Environmental Quality
No. 3:01cv259
entered September 25, 2002..... 13a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

KELVIN J. HURDLE,

Plaintiff,

v. Civil Action No. 3:01cv259

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

[Entered: September 25, 2002]

MEMORANDUM OPINION

Kelvin Jessie Hurdle, proceeding pro se, instituted this action against the commonwealth of Virginia Department of Environmental Quality ("DEQ") alleging racial discrimination, disparate treatment, and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 200e *et seq.*, defamation, intentional infliction of emotional distress, wrongful discharge, violations of state personnel policy, and failure to follow statutory grievance procedures. Hurdle also sought relief under 42 U.S.C. §§ 1983 and 1985, apparently for alleged violations of the Equal Protection Clause of the Fourteenth Amendment.

Proceeding in accordance with Fed. R. Civ. P. 56, DEQ has moved for summary judgment on three separate grounds. First, DEQ asserts that the Rooker-Feldman doctrine deprives the Court of subject matter jurisdiction over Hurdle's claims. Second, DEQ argues that 28 U.S. C. § 1738 and the Full Faith and Credit Clause, U.S. Const. Art. IV, § 1, cl. 1, preclude Hurdle from litigation his claims in this Court because there were fully adjudicated in previous state court proceedings. Finally, DEQ urges that there exists no genuine issue of any material fact respecting -the claims in Hurdle's Amended Complaint.[1]

STATEMENT OF FACTS

Kelvin Jessie Hurdle graduated from Virginia State University in 1977 with a B.S. in geology. Hurdle also earned a master's degree in geology from the University of South Carolina in 1980. IN 1988, Hurdle obtained employment as a geologist with the Virginia Department of Waste Management.

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1 Following DEQ's Rebuttal Brief in Support of Motion for Summary Judgment, and less than 11 days before the hearing set for the defendant's motion, Hurdle submitted a number of pleadings for consideration in connection with the motion for summary judgment without first seeking leave to do so, as required by Local Rule 7(e). For that reason and because of prejudice to DEQ, the Court granted DEQ's motion to strike Hurdle's response to DEQ's Rebuttal Brief and Hurdle's pleading entitled "Excerpt's of Deposition and Testimony to Oppose Defendant's Motion for Summary Judgment. "Acting on its own motion, the Court also struck Hurdle's pleading entitled "Motion to Include Itemized Evidence that Show there are Material Facts that are in Dispute." and Hurdle's "Proposed Stipulations (Joint)."

Following work in the hazardous waste program run by that department, Hurdle worked in the personnel section at DEQ for four years. During November of 1998, in lieu of a layoff, Hurdle was reassigned within DEQ to the position of Environmental Engineer Senior, Office of Waste Permitting, where Hurdle reported to Howard Freeland, a white male.[2] Freeland has served on the hiring panel that elected to hire Hurdle in 1988 and had been present during Hurdle's interview for that position. At some point during early 1999, Freeland verbally admonished Hurdle respecting his failure to arrive at work on time and his use of the telephone and facsimile machine for personal business. Only July 16, 1999, Freeland issued Hurdle's interim performance evaluation, which was the first failing evaluation Hurdle had received in his 11 years of employment with DEQ.

On August 26, 1999, Hurdle filed a complaint with the Equal Employment Office of the Virginia Department of Personnel and Training ("DPT") alleging racial discrimination in the workplace. In September 1999, Freeland issued Hurdle's annual performance evaluation, which rated Hurdle "fair but needs improvement" in all categories. Following an administrative appeal within the DEQ, Hassan Vakili, having found a lack of sufficient documentation to support the finding made by Freeland, raised Hurdle's

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[2] Hurdle's job responsibilities included, among other things, reviewing groundwater monitoring plans and data, determining compliance with environmental regulations, evaluating and drafting permit amendments and variances to regulatory requirements, providing technical assistance and technology transfer to solid waste operators, and responding to interested parties respecting regulations and variances. Def. Encl. X.

evaluation to "meets expectations." According to Vakili, he consulted with his supervisor, David Paylor, and they decided to give Hurdle this relief as a good faith gesture.

Sometime during December 1999, Hurdle again complained to DEQ management about racial discrimination in the workplace, generally. Thereafter, on February 9, 2000, Hurdle filed his first claim with the federal Equal Employment Opportunity Commission ("EEOC") alleging racial discrimination and retaliation for participation in protected activities. The EEOC found no basis for Hurdle's claims and thus issued a Right-To-Sue letter on February 29, 2000. On May 26, 2000, Hurdle filed an action in federal court ("Hurdle I") alleging racial discrimination, disparate treatment, hostile work environment, and retaliation in employment in violation of Title VII.

On May 31, 2000, and again on June 6, 2000, supervisors Leslie Romanchik and Freeland, along with Peggy Hawkins of Human Resources, met with Hurdle to discuss his job performance. At these meetings, Hurdle was informed that his interim performance evaluation was "Does Not Meet Expectations," but these DEQ management officials also attempted to discuss with Hurdle how management could help him to improve. Sometime during June 2000, DEQ assigned Larry Syverson to mentor Hurdle. During the 2000 performance cycle, DEQ documented Hurdle's performance more thoroughly and sent him to community college to improve his writing ability. On July 5, 2000, DEQ reduced Hurdle's workload by reassigning a number of Hurdle's projects to his co-workers.

On July 28, 2000, Freeland issued a counseling memorandum to Hurdle, in part, directed to Hurdle's deficient compliance with DEQ's policy for tracking (by the use of "tracking sheets") the timeliness of responses to inquiries made to DEQ. Subsequently, Freeland accused Hurdle of making unauthorized entries on the correspondence tracking sheets. Hurdle responded, by turning the tables on Freeland, charging him with making the unauthorized entries. This dispute later became the basis for what Hurdle is fond of calling the "fraudulent document changes" in subsequent grievances and litigation.

On or about September 15, 2000, Freeland issued an annual performance evaluation for Hurdle, describing his performance and "Doe Not Meet Expectation" in each category. Romanchik reviewed the rating and agreed with it. Not long thereafter, in an effort to settle Hurdle I, a Magistrate Judge of this Court recommended that Hurdle be assigned a new supervisor. On October 10, 2000, Syverson and Hurdle worked out a performance plan for Hurdle to follow for the ensuing 90 days. On or about October 20, 2000, Syverson issued Hurdle a "Group II Disciplinary Notice" which citd Hurdle for not following Syverson's instructions to inventory the work in Hurdle's office. There was no accompany suspension or punishment, and, after the appeal, the notice was later removed from Hurdle's employment file. On October 20, 2000, Hurdle filed an EEOC claim in which he claimed racial discrimination and retaliation based on the 2000 evaluation given by Freeland and Romanchik.

On November 16, 2000, DEQ management held yet another counseling meeting with Hurdle, at which both Syverson and Freeland were present. During this meeting, Hurdle was informed that he was not meeting established schedules, and the management representatives attempted to address areas in which Hurdle's performances was deficient. Syverson offered to assign a mentor to improve Hurdle's performance. But Hurdle rejected that offer because it would have required him to work five days per week from 7:00a.m. to 3:30p.m., rather than his current flex schedule of four days per week, which allowed him to operate an outside consulting business. Syverson also offered to haveHurdle share an office with a co-worker in order to facilitate an exchange of idea's and provide prompt answers to Hurdle's questions. Hurdle rejected this offer as well. Instead, on November 27, 2000, Hurdle filed a grievance seeking to have the September 15, 2000 performance evaluation issued bhy Freeland and Romanchik raised to "meets expectations."

On January 5, 2001, this Court entered an order granting DEQ's motion for summary judgment and dismissing Hurdle I with prejudice. That decision was affirmed on appeal. Hurdle v. DEQ, CA No. 3:00cv336 (E.D. Va. January 5, 2001) (unpublished) ("Hurdle I"), aff'd per curiam (4th Cir. July 16, 2001) (unpublished), cert. denied (U.S. Sup. Ct. March 18, 2002).

On January 11, 2001, Syverson completed Hurdle's 90-day evaluation, which evaluated Hurdle's efforts in completing the performance plan jointly created on October 10, 2000. This evaluation rated Hurdle as "Does Not Meet Expectation" in all six categories of his performance plan, with an overall

performance level of "Does Not Meet Minimum Expectations." As a result, Hurdle was terminated from his position effective January 16, 2001. On January 23, 2001, after investigating, the EEOC issued a second Right-To-Sue letter. That letter responded to the EEOC complaint that Hurdle had filed on October 20, 2000.

On February 14, 2001, Hurdle filed a grievance complaining of the 90-day performance evaluation and subsequent termination. The stated grounds for this grievance included: wrongful termination, retaliatory discharge, termination due to prejudice, and DEQ's failure to adhere to agency employment policies and state agencies procedures.

On March 14, 2001, Hurdle filed another EEOC claim, complaining that his termination was racially motivated and retaliatory. After investigation, the EEOC issued a Right-To-Sue letter on September 26, 2001.

PROCEDURAL BACKGROUND

On April 20, 2001, Hurdle filed this action. On May 31, 2001, during the pendency of these proceedings, a grievance hearing was convened before a Hearing Officer (the "Grievance Hearing") pursuant to the rules of the Virginia Department of Employment Dispute Resolution. Those rules provide for formal grievance hearings in accordance with the Virginia State Grievance Procedure, Va. Code Ann. § 2.2-3000 *et seq.* (Michie 2001), when a series of three successively higher grievance resolution steps have failed to resolve an employee's complaint. Va. Code Ann. § 2.2-3003. Although such hearings are often the final step in the

grievance procedure, a party may appeal to the circuit court in the jurisdiction in which the grievance arose. Va. Code Ann. § 2.2-3006.

Hurdle's Grievance Hearing was a consolidated hearing of two separate grievances. The first grievance, filed on November 27, 2000, concerned Hurdle's September 2000 performance evaluation. Hurdle alleged in this grievance, *inter alia*, that others within his department were not judged according to the same criteria, that others were given more assistance and training in meeting their job requirements, that others were given a lighter workload, that management did not scrutinize the work of others as closely, that documents were fraudulently being placed to create an appearance that Hurdle was guilty of wrongdoing, and that Hurdle had to file grievances in order to achieve equal treatment. In addition, Hurdle checked a box on the grievance form indicating that he did not present his grievance to his immediate supervisor, Freeland, because he had experienced "discrimination or retaliation" perpetrated by Freeland. Def. Encl. X.

The second grievance, filed on February 14, 2001, concerned Hurdle's 90-day performance evaluation and his subsequent termination. Among other things, this grievance alleged that DEQ did not adhere to the DEQ personnel policy when evaluating and terminating Hurdle, and that Hurdle's termination was a result of prejudice and retaliation for his earlier allegations of racial discrimination Def. Encl. X

In a Qualification Ruling dated April 3, 2001, the Director of the Departme of Employee Dispute Resolution consolidated Hurdle's two grievances. The ruling also specified that , at the ensuing Grievance Hearing , DEQ had the burden of proving that the termination was warranted and appropriated under the circumstances while Hurdle had the burden of proving that the September 2000 evaluation was arbitrary, capricious, or retaliatory.

The Grievance Hearing spanned two days, during which Hurdle was represented by counsel. Hurdle was afforded the opportuninty to present testimony and documentary evidence and to cross-examine DEQ's two witnesses. The record reflects that Hurdle presented two witnesses, testified on his own behalf, and submitted 23 exhibits. At the outset of the Grievance Hearing, the Hearing Officer stated that it was his understanding that part of what Hurdle was trying to prove was retaliation. (tr. 9). Hurdle's attorney asserted that certain exhibits were relevant to prove Hurdle's retaliation claims and , in his opening statement, counsel addressed generally the issues of retaliation and underlying discrimination. (tr. 9). Hurdle's testimony on direct examination included allegations that: (1) his low performance evaluations were retaliation for the Hurdle lawsuit, (tr. 31); (2) he was not allowed the same access to the office as others (all of whom were white) "similarly situated," (tr. 32); (3) his work product was subjected to greater scrutiny than others (all of whom were white) "similarly situate,"

(tr. 30); and (4) Freeland, his direct supervisor, discriminated against him.[3] (tr. 42.)

In opinions dated June 4 and June 21, 2001, the Hearing Officer dismissed all of Hurdle's grievances. In his first opinion, the Hearing Officer found that "[Hurdle] intimates that racial discrimination was a factor in his discharge but he presented no witnesses or documentation to substantiate this allegation." The Hearing Officer also concluded that DEQ compiled with the applicable policies and procedures; that Hurdle's performance evaluation was neither arbitrary nor capricious; and that Hurdle's discharge was solely due to his failure to meet the minimum expectations of his employment. In addition, the Hearing Officer determined that a substantial preponderance of the evidence supported DEQ's detailed dour-page first step response to Hurdle's November 27, 2000 grievance. This first step response had concluded, *inter alia*, that Hurdle was not subject to unequal treatment and that all employee work product was adjudged according to the same standards.

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[3] Defense counsel concedes, and the Grievance Hearing transcript reflects, that Hurdle never explicitly mentioned "racial discrimination" during the hearing. Nevertheless, the record does reflect that Hurdle made repeated references to "discrimination" and "other's similarly situated" and it is undisputed that, during the relevant period, all other persons in Hurdle's work-group were white. On balance, the Hearing Officer had a sufficient basis to conclude that, although Hurdle was raising the issue of racial discrimination, he lacked sufficient evidence to support this claim.

In his second opinion, an itemized response to Hurdle's request for reconsideration, the Hearing Officer found no evidence to support Hurdle's allegations of retaliation or a hostile work environment.[4] Rather, the evidence support a finding that Hurdle's failing performance evaluation was amply supported by documentation and that Hurdle did not achieve the minimum expectations of his position.

On July 20, 2001, Hurdle filed an appeal of the Hearing Officer's ruling to the Circuit Court of the City of Richmond (the "Circuit Court"). Hurdle's brief in support of his notice of appeal claimed that his September 2000 evaluation was arbitrary, capricious, and retaliatory and that this termination was wrongful, unfair, and retaliatory. Hurdle also asserted claims of racial discrimination and disparate treatment, alleging that he was treated differently from "Geofee X. Christie (White Male), " that he was not given the same access to the workplace "as other white employees," and this his termination was based on disparate treatment during his 90-day evaluation. Notice of Appeal for Circuit Richmond, Brief for Kelvin J. Hurdle As Plaintiff §§ D, I ("Pl. Cir. Ct. Petition"); Amended Reply Brief to Employer's Response to Notice of Appeal §§ III.D., III.K ("Pl. Cir. Ct. Am. Repl."); Hurdle's Circuit Court pleading entitled Additional

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[4] Hurdle's claim in his request for reconsideration include, among other things, retaliation for his earlier charges of discrimination and a hostile work environment as evidenced by fraudulent document changes, discriminatory access to the workplace, and the enhanced scrutiny and heightened workload he received in comparison to his white co-workers.

Errors Made By Hearing Officer ¶ 6 ("Pl. Cir. Ct. Addl. Err."). In addition, Hurdle claimed that DEQ violated his "[f]ederal rights as stated and enforced in Title 42 U.S. Code Section 1983." Pl. Cir. Ct. Am. Repl. § F.

Meanwhile, on August 1, 2001, Hurdle filed an Amended Complaint in this action. On October 22, this Court issued an order staying all proceedings pending resolution of Hurdle's appeal in the Circuit Court of the City of Richmond.

On March 25, 2002, the Circuit Court issued a letter opinion upholding the Grievance Hearing decision in all respects. The Circuit Court understood Hurdle to have alleged racial discrimination in the form of disparate treatment, creation of hostile work environment, bias reflected in the excessive scrutiny of his work product, and retaliatory firing," Significantly, the Circuit Court held that DEQ;s actions were not arbitrary or capricious and that "though Hurdle argues that the agency motivation ws based on racial animus, maintaining a hostile work environment, and disparate treatment. . . he does not sufficiently rebut the evidence that he was terminated for deficient performance." On April 24, 2002. Hurdle noted an appeal with the Virginia Court of Appeals.

DISCUSSION

I. The Rooker-Feldman Doctrine

DEQ argues that , under the Rooker-Feldman doctrine, the Court lacks subject matter jurisdiction over this action. That contention must be addressed first.

The Rooker-Feldman doctrine provides that federal district courts lack jurisdiction to hear federal claims that have previously been adjudicated by state courts or that are inextricably intertwined with the merits of a state court judgment. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923); Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000); Edmonds v. Clarkson, 996 F.Supp. 541, 545 (E.D. Va. 1998). A claim is inextricably interwined with the state court decision if: (1) the party had a reasonable opportunity to raise his federal claim in state proceedings, Brown & Root, 211 F.3d at 201, and (2) the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Id.; Edmonds, 996 F.Supp. at 545-46. Alternatively, if the federal court is requested to pass on the merits of a statute court decision, i.e., "if 'in order to grant the federal plaintiff the relief sought, the federal court must determine that the [state] court judgment was erroneously entered or must take action that would render the judgment ineffectual, 'Rooker-Feldman is implicated." Jordahl v. Democratic Party, 122 F.3d 192, 202 (4th Cir. 1997) (quoting Ernst v. Child & Youth Servs., 108 F.3d 486, 491 (3d Cir. 1997).

As indicated above, Hurdle previously sought to resolve certain claims in a Grievance Hearing. The

Circuit Court of the City of Richmond subsequently affirmed the Grievance Hearing decision on appeal..[5]

It is therefore necessary to examine each count[6] of Hurdle's Amended Complaint in this action to determine whether the federal claims therein

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[5] The rationale underlying the Rooker-Feldman doctrine is that federal appellate review of state decisions may only be had in the Supreme Court of the United States. Hurdle asserts that the Rooker-Feldman doctrine is inapplicable to the instant action because, under the grievance process, the Circuit Court decision is not appealable beyond the Court of Appeals of Virginia and therefore, by Hurdle's reasoning, cannot reach the Supreme Court of the United States. Although an administrative decision that a grievance does not qualify for a hearing is not appealable beyond the Court of Appeals of Virginia, Va. Code § 2.2-3004.E, it does not appear that the Virginia Court so limits appellate review of hearing officer determinations. In any event, the Supreme Court of the United States may review the "final judgments or decrees rendered by the highest court of a State in which review of a decision could be had." 28 U.S.C. § 1257. Thus, Supreme Court review is available once a grievance exhausts all available appeals within the state court system and the Supreme Court may review a decision by a lower state court if not appellate review of that decision is available within the state. See Erwin Chemerinsky, Federal Jurisdiction, § 10.4.2 (3d ed. 1999). It is for this reason that "[w]e are not in a position ... to demand that the state restructure its appellate system in order fro its judgments to be given effect." Brown & Root, 211 F.3d at 202.

[6] In Count IV, and portions of Count III, Hurdle asserted a claim for the tort of intentional infliction of emotional distress and also alleged that DEQ conspired with the Hearing Officer to violate Hurdle's right in violation of 42 U.S.C. §§ 1983 and 1985. Hurdle abandoned these claims in open court during the hearing on DEQ's motion for summary judgment. In any event, Hurdle asserted identical Section 1983 and Section 1985 allegations before the Circuit court and therefore may not re-litigate those claims before this Court. Cf. Jordahl, 122 F.3d at 202 (" [Plaintiff] may not escape the jurisdictional bar of Rooker-Feldman by merely refashioning its attack on the state court judgments as a § 1983 claim").

previously were adjudicated by either the Hearing Officer or the Circuit Court or were inextricably interwined with the decision of either tribunal.

The following detailed analysis aside, it would be noted at the outset that the majority of Hurdle's Amended Complaint differs only in organization, not insubstance, from Hurdle's brief in support of his notice to appeal to the Circuit Court. Although the stated causes of actions are new, the federal allegations are either identical to, or expansions of, the allegations made in the Circuit Court and during the Grievance Hearing.

A District court my properly invoke Rooker-Feldman where the allegations in the plaintiff's state pleadings "clearly implicate" the substance of the federal complaint, or where the federal claims are "but an expansion" of the plaintiff's assertions in the state proceedings. See, r.h., Friedman's, Inc. v. Dunlap, 290 F.3d 191, 197 (4th Cir. 2002) (comparing counts in plaintiff's federal complaint to plaintiff's state court motion to compel arbitration); Alder v. James, 2000 WL 1825422, at *2-3 (4th Cir. Dec. 13, 2000) (unpublished) (comparing federal complaint to state complaint); Brooks v. Prince George's County, Maryland, NO. CIV.A. AW-00-1878, 2000 WL 1708211 (D. Md. Nov. 14, 2000) (unpublished) (comparing federal complaint to state complaint).[7]

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[7] Local Rule 36(c) of the United States Court of published opinions are not binding as precedent in the circuit and, in fact, discourages their citation except in unusual circumstances. Nonetheless, unpublished decisions are of utility in assisting the analysis of the issues.

Therefore, wholly apart from the ensuing count-by-count analysis, the Rooker-Feldman doctrine deprives this Court of jurisdiction because, in his Amended Complaint, Hurdle merely has attempted to refashion his state claims. Consideration of those claims here would constitute federal review of the Circuit court decision, a review that is constitutionally impermissible.

A. Count I

Count I of Hurdle's Amended Complaint alleges employer retaliation for participation in protected activities in violation of Title VII § 704 (a), as amended, 42 U.S.C. § 2000e-3(a). The factual basis for Count I involves, in substantial part, matters previously dismissed with prejudice on summary judgment in Hurdle I, e.g., allegations of retaliation due to Hurdle's failing September 1999 performance review. This Court's decision in Hurdle I precludes any reconsideration of such matters.

The new retaliatory conduct alleged in Count I consists of: (1) issuing Hurdle an October 20, 2000 "Group II Disciplinary Notice;" (2) issuing a "counseling memorandum;" (3) fraudulently changing documents in a manner that reflected negatively on Hurdle's performance; (4) preventing Hurdle from working after-hours to complete job tasks; (5) terminating Hurdle from employment effective January 16, 2001; (6) failing to assign Hurdle to a new position in a different department in lieu of

termination; and (7) wrongfully challenging Hurdle's post-employment benefits.[8]

Hurdle did not invite Title VII in the Grievance Hearing or in the Circuit Court, but Hurdle did raise there the allegedly retaliatory conduct of which he complains in Count I here. Those assertions of retaliation were abundantly addressed in the pleadings, the testimony, the evidentiary exhibits, the Hearing Officer's decision, and the Circuit Court's opinion.[9] Both the Hearing Officer and the Circuit Court judge ultimately determined that Hurdle's poor performance evaluations and subsequent discharge were not acts of retaliation. Hurdle would have this Court essentially reopen those facts and review the accuracy of the decisions rendered by those state administrative and judicial tribunals. Hurdle's Title VII claim in Count I cannot succeed unless this Court ultimately determines

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[8] Although it appears that the Rooker-Feldman doctrine would not apply to Hurdle's claim that DEQ retaliated by wrongfully challenging his claim for post-employment benefits because that allegation was not addressed in the prior state proceedings, Hurdle abandoned that aspect of Count I in open court during the hearing on DEQ's motion for summary judgment.

[9] See, e.g., Pl. Cir. Ct. Petition, ¶¶ C (counseling memo and associated meetings), D (counseling memo, F (fraudulent documents changes and Group II Disciplinary Notice), I (workplace access), N (Group II Disciplinary Notice, O (workplace access), A2 (workplace access), and Grievance 2 (termination); Pl. Cir. Ct. Addl. Err., ¶ 3 (fraudulent document changes and Group II Disciplinary Notice); Pl. Cir. Ct. Am. Repl., § III.I (workplace access); Cir. Ct. Letter Op. (finding that DEQ's determination that other openings in the agency were not suitable for Hurdle was in accordance with policy and not arbitrary or capricious); Grievance Hearing Op. (determining that Hurdle was discharged due to failure to meet minimum expectations).

that the Circuit court and Hearing Officer were erroneous in finding that these actions were not retaliatory. A determination of that sort by a federal district court is precisely the type of appellate review that the Rooker-Feldman doctrine forecloses.

B. Count II

In Count II, the Amended Complaint alleges employment discrimination in violation of Title VII § 706, as amended, 42 U.S.C. § 2000e-5. The factual basis for this assertion is that, unlike white employees, Hurdle was "suspended from access to the office after hours and denied access to the files." Hurdle made the same allegation before the Hearing Officer during the Grievance Hearing. The Hearing Officer determined that Hurdle was excluded because "[d]uring that time, the files of the agency were being audited" and "[t]he auditors required that all the files be locked at night thereby making it impossible for anyone to work overtime." Grievance Hearing Op., at 9; see also Grievance Hearing Response to Reconsideration Request, at 3, ¶ 8. The Circuit court affirmed that finding. Circuit Court Letter Op at 6. To find here that Hurdle's exclusion was discriminatory rather than solely due to the ongoing audit world contravene the Rooker-Feldman doctrine.

C. Count III

Count III asserts racial discrimination and disparate treatment claims under Title VII § 706. To the extent that this claim is based on discriminatory access to the workplace, it essentially duplicates portions of Count II and therefore will be disposed of in the same manner.

As an additional basis for the § 706 claim, Hurdle alleges that, on one occasion his former supervisor, Freeland, would only make himself available to discuss a particular matter with Hurdle if Geoffee X. Christie, a white make, wished to discuss the matter. Notably, Hurdle does not allege that Freeland took this action because of Christie's race or, more importantly, because of Hurdle's race. Hurdle makes only the naked assertion that Christie is a "White-Mail." That, of course, is not a sufficient basis for a discrimination claim of any sort. Moreover, this precise allegation was before the Circuit Court,[10] which refused to credit Hurdle's discrimination claim. Thus, under the Rooker-Feldman doctrine, this Court is without jurisdiction to review that determination.

D. Hurdle's Position On the Rooker-Feldman Doctrine

First, Hurdle asserts that the Rooker-Feldman doctrine is not applicable to any of his discrimination claims or the retaliation claim because the Qualification Ruling did not mention discrimination[11] and because neither the Circuit Court nor the Hearing Officer considered his allegations of discrimination or

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[10] Pl. Cir. Ct. Petition, ¶ D.

[11] Hurdle asserts that he could not raise discrimination issues because his grievances did not qualify for a hearing that basis. This argument has conceptual appeal because a hearing officer is empowered to provide remedies only for "those issues qualified for a hearing." Va. Code § 2.2-3005.C.6. But see Va. Code §2.2-3005.C.7 (empowering the hearing officer to "[t]ake other actions as necessary or specified in the grievance procedure."). Nevertheless, the record reflects that discrimination was indeed addressed in both the Grievance Hearing and the Circuit Court.

retaliation. The pleadings, transcripts, and written opinions in both prior proceedings belie that contention.[12]

Second, Hurdle argues that he could not raise discrimination or retaliation during the Grievance Hearing or Circuit Court appeal because he had not yet received an EEOC Right-To-Sue letter respecting those claims. Contrary to Hurdle's allegation, the EEOC issued a Right-To-Sue letter on January 23, 2001 respecting the complaint that Hurdle had filed on October 20, 2000. In that complaint, Hurdle alleged that he was subjected to continuing acts of retaliation both because he is Black and as a result of his previous EEOC discrimination charges. The EEOC issued a Right-To-Sue letter on September 26, 2001 in response to the EEOC complaint that Hurdle had filed on March 14, 2001. Thus, a Right-To-Sue letter preceded both the Grievance Hearing and the Grievance Opinion. An additional letter was issued before the Circuit Court

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[12] The Circuit Court treated Hurdle's petition as embracing claims of "racial discrimination in the form of disparate treatment, creation of a hostile work environment, bias reflected in the excessive scrutiny of his work product, and retaliatory firing." Circuit Court Letter Op at 2. Hurdle's Circuit Court pleadings included repeated allegations of retaliation and made repeated references to privileges that were allegedly bestowed on white employees but denied to Hurdle. Pl. Cir. Ct. Petition, §§ D, F, I. Hurdle also asserted disparate treatment claims in his Circuit pleadings and admits that a ruling that he was terminated for failing to meet minimum job expectations subsumes his disparate treatment claim. Id. §§ D, K; Pl. Cir. Ct. Addl. Err., ¶ 6. The Grievance Hearing decision and transcript also show that retaliation, discrimination and disparate treatment allegations were addressed by the Hearing Officer and in Hurdle's testimony. See, e.g., tr. at 9-10, 31-32, 39, 41-42.

heard the grievance appeal and before it decided the appeal on March 25, 2002.

First, the Virginia State Grievance Procedure allows an employee to qualify for a hearing if his grievance relates to retaliation or "discrimination on the basis of race." Va. Code § 2.2-3004.A (iii, v, and vi); see also Pignato v. Virginia Dep't of Envtl. Quality, 948 F. Supp. 532 (E.D. Va. 1996) ("Where the grievance procedure is available, it may be used to challenge formal disciplinary actions, applications of written policies and procedures, arbitrary or capricious performance evaluations, acts of retaliation, and discrimination on the basis of race ... ."). The state's grievance procedure does not provide that an EEOC Right-To-Sue letter is prerequisite for such a complaint. And, as explained above, Hurdle took advantage of the state grievance procedure by making racial discrimination and retaliation a part of the grievance case presented to the Hearing Officer and the Circuit Court.

Second, having made those issues part of the state grievance procedure, Hurdle may not present a somewhat modified, but integral, aspect of them in a subsequent federal action. ""Even if a claim is not presented to a state court ... a plaintiff is not entitled to bring that claim in federal court if the claim was one that should have been brought in state court." Guess v. Board of Medical Examiners, 967, F.2d 998, 1003 (4th Cir. 1992). Having raise his discrimination and retaliation claims in the previous state proceedings, Hurdle was required to present them fully or face the risk that he could have the omitted aspects of them considered in federal court. DEQ's performance

review procedures, the propriety of the performance review, and Hurdle's termination were the primary points of contention in the state proceedings. Grievance Hearing Op., at 2 (stating that the issues to be resolved at the hearing were Hurdle's grievance respecting his 2000 performance evaluation and his subsequent discharge). Hurdle's retaliation and discrimination claims were "part and parcel of the issues pending in, or which could have been raised in," the Grievance Hearing. Edmonds, 996 F.Supp at 551.

The federal claims that Hurdle presents in this action were inextricably intertwined with those that he presented in the State proceedings. He had a full and fair opportunity to litigate the discrimination and retaliation issues in the state proceedings and he, in fact, did so. He cannot, as has been done here, merely recast those issues or add new concepts to them in a subsequent federal action because to do so would require that a federal court review the state court's decision. As such, the Rooker-Feldman doctrine deprives this Court of jurisdiction over those claims. Guess, 967 F.2d at 1004.

It is well to note that Hurdle was not required to litigate in the state grievance process any claims under Title VII for racial discrimination or retaliation. Indeed, at oral argument, counsel for DEQ acknowledged that Hurdle could have gone forward with the grievance procedure without presenting those claims and that the Rooker-Feldman doctrine, would not then bar a subsequent timely federal action asserting the Title VII claims. But having chosen to make those claims a part of the grievance procedure, Hurdle, as the DEQ correctly argues, is foreclosed from

recasting them for subsequent presentation here. Were that not so, the effect of the Rooker-Feldman doctrine would be materially diminished and the constitutional precept that the doctrine implements would be seriously compromised, if not eviscerated.

III. The State Law Claims In Count II

Count II also makes sundry factual assertions essentially amounting to four claims arising under Virginia law: (1) that the DPT policy respecting employee performance evaluations violates the Virginia Constitution; (2) that "DEQ violated Mr. Hurdle's rights by violating Chapter 10.01 Section 2.1-1167.05 of the Code of Virginia;"[13] (3) wrongful termination, apparently under state law; and (4) defamation.

"In exercising supplemental jurisdiction over related state law claims, however, the federal claim must first have substance sufficient to confer subject matter jurisdiction n the district court." Edmonds, 996 F.Supp at 552. Hence, because the Curt lacks subject matter jurisdiction over all of Hurdle's federal claims by virtue of the Rooker-Feldman doctrine, it also lacks supplemental jurisdiction to resolve these four claims, each of which arise under state law. Under 28 U.S.C. § 1367(3), a court may decline to exercise supplemental jurisdiction where "the district court has dismissed all claims over which it has original jurisdiction." Section

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[13] Section 2.1-116.05 has been repealed. To the extent Hurdle intended to allege that DEQ violated Va. Code Ann. § 2.2-3000 *et seq.*, which recodified § 2.1-116.05 effective Oct. 1, 2001, Hurdle maybe understood to allege that DEQ generally failed to follow the employee grievance procedures required by that title.

1367(3) thus grants this Court "wide latitude in determining whether or not to retain jurisdiction over state claims when federal claims have been extinguished." Jordahl v. Democratic Party, 122 F.3d 192, 203 (4th Cir. 1997). The record discloses no valid reason for this Court to exercise supplemental jurisdiction over Hurdle's non-federal claims and thus the invitation to do so is declined.

IV. Collateral Estoppel

It is ordinarily preferable not to articulate alternate grounds for decision. Karsten v. Kaiser Found, Health Plan of the Middle Atlantic States, Inc., 36 F.3d 8, 11 (4th Cir. 1994). However, considering that dismissal of the federal claims is jurisdictional and that collateral estoppel is a doctrine somewhat related to the Rooker-Feldman doctrine, it would seem prudent to address DEQ's argument that Hurdle's federal claims are barred by collateral estoppel.

In accordance with the Full Faith and Credit Clause (U.S. Const. Art. IV, § 1, cl. 1) and its enabling statue, a federal court is obligated to accord a state judgment the same preclusive effect to which it would be entitle under the law of the state in which the judgment was rendered. See 28 U.S.C. § 1738 ("The records and judicial proceedings of any court of any ... State ... shall have the same full faith and credit in every court within the Unites ... as they have by law or usage in the courts of such State ... from which they are taken."); see also Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81-82 (1984); Allen v. McCurry, 449 U.S. 90, 96 (1980); Storey v. Patient First Corp. 207 F.Supp. 2d 431, 457 (E.D. Va. 2002).

The Supreme court repeatedly has concluded that Section 1738 applies to state agency administrative determinations as long as such determinations were reviewed by a state court. University of Tenn. v. Elliot, 478 U.S. 788, 794 (1986); Kremer v. Chem Constr. Corp., 456 U.S. 461, 481 (1982) ("It is well established that judicial affirmance of an administrative determination is entitled to preclusive effect").[14] Title VII and 42 U.S. C. § 1983 actions are not exempt from this requirement. Kremer, 456 U.S. at 477.

Therefore, the Circuit Court Opinion affirming the Grievance Hearing decision precludes Hurdle from asserting claims in federal court if: (1) the Commonwealth of Virginia would give the opinion preclusive effect; and (2) Hurdle asserted those claims either in the Grievance Hearing or in his appeal to the Circuit Court.

A. Virginia Law On Collateral Estoppel

Virginia law on collateral estoppel is well-settled. Settle v. S.W. Rodgers Co., 998 F.Supp. 657

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[14] The Virginia State Grievance Procedure clearly contemplates a hearing that is judicial in nature. See, e.g., Va. Code § 2.2-3005 (empowering the hearing officer to, *inter alia*, hold settlement conferences, dispose of procedural requests, issue subpoenas, administer oaths, and receive and exclude evidence). To the extent that the Grievance Hearing was judicial in nature, rather than administrative, it is entitle to preclusive effect even absent state court review. Elliott, 478 U.S. at 799 ("When a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's courts.") (quotation and citation omitted).

(E.D. Va. 1998). The doctrine "precludes parties to a prior action and their privies from litigating in a subsequent action any factual issue that actually was litigated and was essential to a valid, final judgememt in the prior action ," TransDulles Center, Inc., v. Sharma, 252 Va. 20, 22, 472 S.E 2d 274, 275 (Va, 1996). For this doctrine to apply then:

> the parties to the two proceedings, or their privies, must be the same; the factual issue sought to be litigated actually must have been essential to the prior judgement; and the prior action must have resulted in a valid, final judgement against the party sought to be precluded in the present action.

Settle, at 665 (quoting TransDulles)

The Parties in this actions are identical to the parties in the previous state proceedings. Findings by a hearing officer acting pursuant to Virginia's statutory grievance procedure are "final, binding, and enforceable in Virginia," 15 Roberts v. County of Fairfax, 937 F. Supp. 541 (E.D. Va. 1996) see also Layne v. Campbell County Dept. of Social Services. 939 F.2d 217 (4th Cir. 2001) What remains, then, is to examine Hurdle's Amended Complaint to determine whether each of Hurdle's allegations were: (1) litigated I the prior proceedings, and (2) resolved in a manner that was essential to the judgments I the prior proceedings. In order to discove precisely what questions were detrmined by the judgment in a prior action, a federal district court may go behind the judgment and examine the pleadings and evidence in the prior action

to determine which facts were essential to the judgement there rendered. United Shoe Machinery Corp v. United States, 258 U.S 451, 459 (1922) , Aza;ea Drove=In Theatre, Inc. v. Sargov, 394 F. Supp. 568 (E.D, Va. 1975).

B. Esstopped Federal Claims (16)

Count I of Hurdle'a Amended Complaint alleges employer retaliation for participation I protected activities in violation of Title VII § 704(a). Counts II and III allege employment discrimination and disparate treatment in violations of Title VII § 706. .As earlier explained, (17) the factual allegations underlying each count were litigated in one or both of the prior proceedings. All such allegations were resolved in DEQ's favor. For the following reasons, it seems clear that those allegations were also resolved in a manner that was essential to the prior judgments.

Collateral estoppel may apply if an issue is subsumed within an issue that was explicitly determined. See 18 Moore's Federal Practice § 13.03[4] [c] (ed ed. 1998). IN other words, the Court may treat an issue as necessary to a judgment in a prior proceeding if, had Hurdle prevailed on the matter, judgment could not have been rendered in favor of DEQ. See, e.g., Azalea Drive-In, 394 F.Supp at 573 (finding that the state court must have found no duress, because had duress been established, judgment would have been entered in favor of the mater of the note.)

At the Grievance Hearing DEQ had the burden of proving, by a preponderance of the evidence, that

Hurdle's termination was warranted and appropriate under the circumstances. Def. Encl. X. Hurdle had the burden of proving that his performance evaluations and termination were arbitrary, capricious, or retaliatory. Id. The Hearing Officer resolved both disputes in DEQ's favor, concluding that Hurdle was terminated solely due to his failure to meet minimum employment expectations and that the performance evaluations and termination were not retaliatory, arbitrary, or capricious. And, the Hearing Officer held that no evidence supported Hurdle's contentions of racially animated discrimination and retaliation.

On appeal, the Circuit Court held that DEQ acted in accordance with the law and DPT policy in evaluating and terminating Hurdle and also found that the Grievance Hearing decision was "not contradictory to law."[15] Moreover, the Circuit Court treated Hurdle's petition for review as embracing claims of "racial discrimination in the form of disparate treatment, creation of a hostile work environment bias reflected in the excessive scrutiny of his work product, and retaliatory firing." All such claims were resolved in favor of DEQ. It is essential to both the Grievance Hearing and Circuit Court judgments that the evaluation and ensuing termination were not retaliatory or discriminatory. Had the Hearing Officer found otherwise, he could not have ruled that Hurdle was terminated due to his failure to meet minimum expectations. Had the Circuit Court found otherwise,

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[15] That holding subsumes Hurdle's claim that he was wrongfully terminated as well as his claims that DEQ failed to follow the statutory grievance procedure and that the DPT policy violates the Virginia Constitution. Hurdle had unsuccessfully asserted all such claims in his Circuit Court pleadings.

it could not have found that Hurdle failed to rebut the evidence that he was terminated for deficient performance. Because the facts underlying Hurdle's federal claims were essential to these prior judgments, Section 1738 bars Hurdle from relitigating those facts in this Court.

Hurdle argues that the prior proceedings are not entitled to full faith and credit because, at the Grievance Hearing, the proceedings were tape-recorded rather than transcribed by a court reporter and because the Hearing Officer refused to admit portions of Hurdle's proffered evidence.

The Supreme Court of the United States has held that "redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Montana v. United States, 440 U.S. 147 163 n. 11 (1979). The procedural phenomena noted by Hurdle are not sufficient to raise such a doubt. First, the Virginia State Grievance Procedure empowered the Hearing Officer to "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs" and to "rule upon offers of proof." Va. Code. § 2.2-3005.C.5. To find that Hurdle did not have full and fair opportunity to litigate an issue because the Hearing Officer determined that certain evidence was not relevant "would be inconsistent with the very rationale upon which the doctrine of collateral estoppel rests." Pignato, 948 F. Supp. at 539 n. 7.

Second, the Virginia State Grievance Procedure requires only that the hearing officer "oversee a verbatim recording of the evidence." Va. Code. § 2.2-

3005.C.5. Hurdle cites no legal authority that the recording must occur by other than electronic means in order for the statute to be satisfied or for a grievance hearing or its subsequent appeal to have preclusive effect and the Virginia Code exhibits no such reguirement.

Finally, Hurle asserts that the state asproceedings are not intitled to preclusive effect because the Circuit Court appeal was not de novo. Asimilar contention may have swayed the sissenting justices in Kremer. But the majority disagreed, noting that "[t)]here is no requirement that judicial review ust proceed de novo if it is to be preclusive," Kremer, 456 U.S. at 480 n.21. Contra id., 456 U.S. at 491-92 (Blackmun, J. dissenting).

CONCLUSION

Including EEOC determinations, secondary and tertiary reviews of his multiple grievances, and a previous adjudication in this very Court, Hurdle had had no less than eight opportunities for impartial review of his multifarious claims of discrimination and retaliation. Hurdle's asserted claims in this action consist exclusively of matters that were previously litigated an decided in both the Grievance Hearing and Hurdle's subsequent appeal to the Circuit Court. As such, the Rooker-Feldman doctrine deprives this Court of jurisdiction to rule on Hurdle's claims. Additionally, because the judgment of the Circuit Court disposed of each of Hurdle's claims and the elements of collateral estoppel are met, Section 1738 precludes relitigation of those claims in this Court. Because summary judgment is appropriate under either or both of these theories, it

would be improper for this Court to expound on the merits of Hurdle's claims.

For the foregoing reasons, the defendant's Motion for Summary Judgment is granted and the plaintiff's federal claims are dismissed. Dismissal under the Rooker-Feldman doctrine is without prejudice. Dismissal under the alternate ground of collateral estoppel is with prejudice to further litigation in any court except for any appeal under state law of the Circuit Court decision. The plaintiff's claims are dismissed without prejudice.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

_____

United States District Judge

Richmond, Virginia

Date: _____

(3)

No. 03-206

Supreme Court, U.S.
FILED
OCT 3 1 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

In Re: Summary Judgment of
Retaliation/Race Discrimination Case

KELVIN J. HURDLE,
Petitioner.

v.

VIRGINIA DEPARTMENT
OF ENVIRONMENTAL QUALITY,
Respondent.

On Petition for Rehearing based on the Merits
United States Court of Appeals
For the Fourth Circuit

PETITION FOR REHEARING BASED ON THE MERITS

Kelvin J. Hurdle
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34 11

QUESTIONS PRESENTED

1. Is the right to due process denied the plaintiff when the hearing officer ignores Va. Code § 2.2-3005.C-6 and rules on an issue not before or qualified for a hearing and the respective action has a substantial and controlling effect on the case?

2. Can full faith and credit be given to a grievance hearing where the hearing officer clearly see and documents in the record, that the evidence of the employers testimony is conflicting along every line of questioning, and still rules in favor of the employer?

3. Does a claim of retaliation, filed originally in the Federal Court, have priority jurisdiction over a grievance step of an administrative judicial review? Additionally, should an administrative judicial review of retaliation, ordered by the Federal Court, preclude the plaintiff's rights to litigate his discrimination complaint in Federal Court?

4. Should preclusive effect be granted to a grievance step of judicial review in Virginia; when Virginia law only gives preclusive effect to complaints actually tried or determined on the merits in a state court? Additionally, if the Federal Court allowed the continuance of a Title VII retaliation case, and ignored a motion for dismissal base on collateral estoppel of a grievance hearing; should that Federal Court stay the existing federal procedures and order the plaintiff to proceed with the administrative step of judicial review as motioned and requested by the defendant? Should that Federal Court subsequently deny the plaintiff the right to proceed with his complaint in Federal Court by reason of collateral estoppel?

PARTIES TO THE PROCEEDING

Petitioner:

Kelvin J. Hurdle,

Respondent:

Virginia Department of Environmental Quality,

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The opinions of the United States Court of Appeals for the Forth Circuit in Kelvin J. Hurdle, Plaintiff-Appellant, versus The Commonwealth of Virginia, Department of Environmental Quality, Defendant-Appellee Case No. 02-2138 are unpublished. Copies of the Opinions are included in the Appendix at Appendix page 1a in the Petition for Writ of Certiorari. The Orders of the District Court for the Eastern District of Virginia are included in Appendix at Appendix page 13a in the Petition for Writ of Certiorari.

JURISDICTION

The United States Court of Appeals for the Forth Circuit filed its Mandate on the judgment entered by the court on 12/19/02. A timely filed Petition for Rehearing and Rehearing En Banc was denied on March 11, 2003 (Appendix 5a). The Petition for Writ of Certiorari was filed within 90 days of the denial of the Petition for Rehearing. The Petition for Writ of Certiorari was denied 10/6/03. The court's jurisdiction is invoked pursuant to 28 U.S.C §§ 1254 (1) and 2106.

STATUTORY PROVISIONS INVOLVED

This action is brought on behalf of Kelvin J. Hurdle seeking to implement the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. This Court has subject matter jurisdiction pursuant to (a) 28 U.S.C. § 1331, because the case arises under the Constitution and laws of the United States; (b) 28 U.S. C. § 1343 because this action seeks redress and damages for violation of 42 U.S.C. § 1983 and 1985,

and in particular, the due process and equal protection provisions of the United States Constitution, including the rights protected in the Fifth, Seventh Ninth and Fourteenth Amendments.

This Court has jurisdiction of the action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

Venue is appropriate in this judicial district under 28 U.S.C. § 1391 (b), because Defendant is a state agency functioning in Richmond, Virginia, and a substantial part of the events giving rise to this Complaint occurred in Richmond, Virginia. Defendant the Department of Environmental Quality is a state agency maintained and funded in significant part by the Commonwealth of Virginia.

STATEMENT OF THE CASE

Hurdle is an African-American male that has made several attempts to obtain an attorney [Appendix 7a]. The one attorney that Hurdle obtained, after over 10 different consultations, worked on the case for 3 weeks and then refunded the total 5,000.00 retainer declaring that the decision for the Federal Complaint case has already been made. Not being able to obtained loyal representation has had a controlling effect on the outcome of this case.

Hurdle was employed by DEQ since 1988, and was hired as a Geologist. He was promoted in 1989 to the position of Geologist C, then again in 1996 to the position of Training and Development-Manager ("TD Manager"). Hurdle participated in protected activity from December 1999 through December 2000. 0n

January 21, 2001 Hurdle was terminated for allegedly not meeting the minimum expectations in any category of his job performance. Hurdle filed an administrative grievance for arbitrary and capricious performance evaluation given in retaliation. Hurdle filed an administrative grievance that took placed May 31 and June 1, 2001. Hurdle filed for the judicial review July 2001. The Department of Environmental Quality ignored and failed to timely respond and submits the grievance records to the State Court. Hurdle then filed his amended complaint in Federal Court August 1, 2001 to pursue his claim of retaliation, hostile work environment and discrimination. In September of 2001, the Federal Court issued an order-instructing Hurdle to pursue the judicial review of the administrative process, upon the motion of DEQ. Motions were filed for summary judgment by DEQ and in opposition to summary judgment by Hurdle. A prima facie case was shown and proven by Hurdle for retaliation, discrimination and a hostile work environment The issues of discrimination or retaliation were not tried in the state court. The preclusive effect given to the judicial review of the grievance hearing is in conflict with Virginia Law and previous cases that have been ruled upon by the United States Supreme Court. Moosavi v. Fairfax County Bd. Of Educ., 666F.2d 58 (1981). Haring v. Prosise, __US__,103 S. Ct. 2368, 76 L.ED.2d 595 (1983). Not having the same consideration or legal conclusions established in the Moosavi v. Fairfax or the Haring v. Prosise case has had a substantial and controlling effect in the out come of this case.

Additionally, neither the discrimination issue nor the hostile work environment issue filed in Hurdle's Federal complaint was ever a part of the administrative grievance that had an administrative judicial review. Therefore, the administrative grievance should not be given preclusive effect, as clearly noted by Virginia Law and as indicated by the previous cases ruled upon by the United States Supreme Court. Allen v. McCurry, 449 U.S at 96, 101 S. Ct at 415-418 n.7 Patsy v. Florida Board of Regents, 457 U.S. 496, 501-502, 512-513,and n.13 102 S.Ct 2557 2560-61,2567, and n.13 73 L.Ed.2d 172 (1982)

REASONS FOR GRANTING THE JUDGMENT FOR PLAINTIFF

The Appropriateness of Defendants' Motion for Summary Judgment. DEQ'S motion for summary judgment is only appropriate if there is no genuine issue as to any material fact, which would entitle defendant to judgment as a matter of law. Fed. R. Civ. P. 56(c). Since DEQ is the moving, the burden is on it to show the absence of any genuine issue of material fact. The facts themselves, and the inferences to be drawn from the underlying facts, must be viewed in the light most favorable to Hurdle since he is the party opposing the motion. Ross, Id., at 364.

Hurdle is entitled to a trial by jury for his Title VII claims of discrimination, hostile environment and retaliation. Hurdle clearly expressed in open argument September 6, 2002 that the hostile work environment, Title VII discrimination, or several of the issues of retaliation or were never apart of the original grievance and therefore not a part of the judicial review

Appendix [10a-12a]. Hurdle requested a jury trial in the filing federal complaint for the Title VII claims. However, by a request motion of the defendant and order of the federal court, Hurdle was required to proceed to the time barred administrative step of judicial review. Additionally, Hurdle Title VII claims under the provisions of the Civil Rights Act of 1964, as amended should not be barred by and 1929 Doctrine of Rooker-Feldman.

Hurdle has been denied the right to a trial by jury for his Title VII claims. The District Court Judge clearly stated in the written order (pg 29a), "Hurdle did not invite Title VII in the Grievance Hearing or in the Circuit Court, but Hurdle did raise there the allegedly retaliatory conduct of which he complains in Count I here." Additionally, as stated by the District Judge, "a hearing officer is empowered to provide remedies only for those issues qualified for a hearing VA, Code § 2.2-3005.C.6. " Discrimination was not an issue that qualified for a hearing. The most favorable of the possible alternative inferences should be drawn in Hurdle's behalf and Judgment rendered in his favor. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

If the most favorable of possible alternative inferences are drawn in Hurdle's behalf, base on the fact that Hurdle did not raise the discrimination issue in the grievance hearing; Hurdle would have survived summary judgment and his case would have gone to trial. Hurdle's constitutional rights to Due Process and Equality under the Law have been denied.

The District Judge also footnoted on page 22a of the order "[1] Defense counsel concedes, and the Grievance Hearing transcript reflects, that Hurdle never explicitly mentioned "racial discrimination" during the hearing."

Congress expressly recognized in both §706 (b) and §706 (c) that a complainant could bring a Title VII suit in federal court despite the conclusion of a state "proceeding." As Justice Blackmun has written in Kremer v. Chem., 456 U.S. 461 (1982), "The Court must acknowledge, see ante, at 470-471, n.8, when Congress referred to state "proceedings", it referred to both state agency proceedings and state judicial [Page 489] review of those agency proceedings". "For a State Court review is merely the last step in the administrative process, the final means of review of the state agency's decision".

The Fourth Circuit had no difficulty distinguishing a state court trial on a discrimination claim from [page 496] state court affirmance of state agency's determination. Moosavi v. Fairfax County Bd of Education. 666 F2d 58 (1981). Unless and issue was actually litigated and determined in a formal judicial proceeding, Virginia law will not treat it as final. See e.g. Luke Construction Co. v. Simpkins, 223 Va. 387, 291 S.E.2d. 204 (1982). Eason v. Felson, 442 U.S. 127, 139, n.10, 99 S. Ct 2205.2213 n.10, 60 L Ed2d 767 (1954) Haring v. Prosise, __U.S. __, 103 S. Ct. 2368, 76 L.ED.2d.

The administrative grievance held at the Department of Environmental Quality (DEQ) should not be given "Full Faith and Credit" and therefore not given

preclusive effect. The Hearing Officer/Commissioner clearly observed and denoted flags of inconsistency in DEQ responses in every direction of questioning, (Def. Encl. X pg. 110 line 14-15). [Appendix 8a] Montana v. United States, 440 U.S. 147 164, n.11, 99 S.Ct 970, 979, n, 11, 59 L.Ed.2d 210 (1979). The hearing officer did not address the respective facts in his opinion and ruled for DEQ despite the inconsistency is DEQ answers of questions. The actions taken by the hearing officer are definitely intervening circumstances that are substantial and had a controlling effect on the outcome of the case. The actions of the hearing officer denied Hurdle a Full Faith and Credit grievance Hearing.

II. Prima Facie Case

Kelvin Hurdle ("Plaintiff") submits the following responses to establish a prima facie case in the respective case.

Harassment Claim

There is no dispute that Hurdle experienced verbal abuse from Howard Freeland (Encl.XXXVII S. Beverly. 336. trans.hearing pg. 28 lines-15-16) (Encl. XXII.pg. 22 line 13-14) He also experienced disparate treatment as clearly described in the denial of access to the job during the audit (Def.Encl.X.Exh. #19.1of 1) and relative to the discussions of Page County groundwater flow (Encl XXXIII) (Encl.X.Exh. #24.10&11of112). Additionally, the reports by Lawrence Farmer relative to the alteration of work documents, more than adequately prove workplace sabotage (Exhibits XVI

and XVII). Verbal abuse, disparate treatment, and workplace sabotage definitely support a harassment claim. (Raniola v Bratton, 2nd Cir, 81 EPD ¶ (40,706). All positive inference of the respective facts is to be viewed in the most favorable light of the Plaintiff and thereby summary judgment should be denied and a trial date set. Ross v. Communications Satellite Corp., 759 F.2d 355 (4th Cir. 1985).

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(Def.Encl.X.griev.tr.pg 284 line 6-12) Paylor refuse to cover the performance issues with Hurdle point by point as requested by e-mail (Paylor Depo.Pg.12 lines 1-12) (Paylor exhibit 5) and thereby refuse to do an **independent investigation** of the performance issues. Paylor knew that there were some management issues that needed to be addressed as well as communication problems. (Paylor 336 Depo pg. 30 lines 15-25 and pg. 31 lines 4-6) (Paylor encl. XXII pg.20 lines 4-15).

DEQ management participated in the shell game with respect to the ultimate decision-maker. Such actions infer causation with respect to the ultimate decision-maker in a retaliation case (Willis, 118F.3d at 547). Paylor was assigned the Ultimate decision making responsibilities. Paylor states that he was not the ultimate decision-maker, and that Karen Sismour was. (Paylor Depo 06/02). Proof of such manipulation in decision-making is adequate to show intent to retaliate (Willis, 118F.3d at 547). They all met conversed with Karen Sismour (Def.Encl.X griev hr.tr.pg 284 lines 6-12) and terminated Hurdle because of participation in protected activity. The panel of Treacy, Paylor, Sismour and Romanchik, decided to

terminate Hurdle without any independent investigation. They all acted as the supervisor's cat's paw. Therefore, the innocence of the panel members (Treacy, Paylor, Sismour, and Romanchik) should not spare the agency from liability and thereby establishing a causal link. [Shager v Upjohn Co, 913 F.2d 398, 405 (7th Cir.1990)], (Willis, 118F.3d at 547) and Azzaro v. County of Allegheny, 110 F.3d 968, 973-74 (3d Cir. 1997). These actions would not have occurred against Hurdle if he had not participated in protected activity and therefore the respective retaliatory acts have occurred.

Discrimination

The Defendants defense of unsatisfactory performance is a sham. Discriminatory practices, such as the fraudulent changes of documents, have rendered the record mis-leading and the record itself is a mere pretext for discrimination. Freeland testified that any errors made in 2000 were not worst than the errors made in 1999. (griev. tr.pg. 179 lines 8-20) Hurdle rating in 1999 was meets expectations (1999 Performance Evaluation), but was does not meet the minimum expectations in 2000 even though Hurdle improved and was meeting the four hour time limit expectation. Leslie Romanchick testified that even if Hurdle had excellent quality in his work, he probably wouldn't have received and excellent rating (griev. tr.pg. 110 lines 8-12). She testified that quantity wasn't an issue. Romanchick testified that Hurdle had more than twice the sites than other white employees had with one or two year's experience. (Griev. tr.pg. 90 lines 3-6) (Griev. tr.pg. 96 lines 1-4). The Hearing Officer/Commissioner commented with respect to Ms.

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Hurdle should have been allowed access to the office as whites similarly situated. The fact that Hurdle was not allowed in the office during the audit, clearly show that Hurdle was treated differently that the whites similarly situated.

CONCLUSION

Hurdle's claim's of retaliation for participating in protected activity, discrimination and hostile work environment has never been litigated Appendix (10a-12a). Virginia law clearly does not give preclusion with respect to constitutional claims that have never been litigated. As footnoted in the Haring v. Posises 103 S.Ct, 2377 (1983). "Although petitioners also contend that a special federal rule of preclusion is necessary to preserve important federal interest, we fail to understand how any such interest justifies the adoption of a rule that would bar the assertions of constitutional claims which have never been litigated".

Hurdle has shown a prima facie case and has demanded a jury trial with respect to his Title VII claims. Hurdle is entitled to have a trial by jury for his Title seven claims.

WHEREFORE, Mr. Hurdle requests that the Court rescinds and amends summary judgment.

CERTIFICATE OF GOOD FAITH

Pursuant to Supreme Court Rule 44.2 the undersigned does hereby certify that the foregoing Petition for Rehearing is restricted to substantial grounds not previously presented in Petitioners' petition for writ of certiorari and is made in good faith and not for delay.

Kelvin J. Hurdle
Petitioner Pro-se
5001 Hallmark Court
Richmond, Virginia 23234
(804) 271-9315

APPENDICES

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2138

KELVIN J. HURDLE,
Plaintiff – Appellant

Versus

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, District Judge.
(CA-01-259-3)

Submitted: December 16.2002
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[Entered: December 19, 2002]

Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

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Before LUTTIG, MICHEAL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kelvin J. Hurdle, Appellant Pro Se. Martha Murphey Parrish, Assistant Attorney General, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Kelvin J. Hurdle appeals the district court's order dismissing his racial discrimination complaint filed in this employment discrimination action. We have reviewed the record and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Hurdle v. Virginia, No. CA-01-259 (E. D. VA. Sept 25, 2002). We deny Hurdle's motion for appointment of counsel and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

KELVIN J. HURDLE

Plaintiff,

v. CIVIL Action No. 3:01cv259

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant.

ORDER
[Entered: January 5, 2001]

For the reason set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that:

[1] the defendant's Motion for Summary Judgment is granted;

[2] Count IV in its entirety, that part of Count I asserting retaliation in respect of opposition to post-employment benefits, and those parts of Count III asserting the intentional infliction of emotional distress and conspiracy, having been abandoned in open Court, are DISMISSED with prejudice;

[3] The remainder of Counts I and III (not dismissed under paragraph [2] above] and the federal claims in Count II are dismissed without prejudice for lack of jurisdiction;

[4] Alternatively, those Counts referred to in paragraph

[3] above are DISMISSED with prejudice by virtue of the doctrine of collateral estoppel;

[5] The state claims in Count II are DISMISSED without prejudice; and

[5] This action is DISMISSED.

This Order may be appealed by the plaintiff. Any appeal from this decision must be taken by filing a written notice of appeal with the Clerk of the Court within thirty [30] days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

The clerk is directed to send a copy of this Order to the plaintiff and counsel for the defendant.

It is so Ordered.

/s/ Robert E. Payne
Robert E. Payne
United States District Judge

Richmond, Virginia

Date: January 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE FORTH CIRCUIT

FILED
March 11, 2003

No. 02-2138
CA—01-259

KELVIN J. HURDLE

Plaintiff – Appellant

v.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF ENVIRONMENTAL QUALITY

Defendants – Appellees

On Petition for Rehearing and Rehearing En Banc

Appellant's petition for rehearing and rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Patricia S. Connor

CLERK

LEGAL AID JUSTICE CENTER
Richmond Office
101 West Broad Street, Suite 111
Richmond, VA 23220

Lynette Woolfolk

(804) 643-1086 or 1-800-496-0365
FAX: [804] 643-2059

October 7, 2002

Kelvin J. Hurdle
5001 Hallmark Court
Richmond, VA 23234

Re: Kelvin J. Hurdle v. Dept. Environmental Quality

Dear Mr. Hurdle:

It was determined that there was insufficient merit for this office to represent you with your employment matter. Your case file is being close.

I have enclosed your original documents that are being returned to you need additional legal services in the future.

Sincerely,

Lynette Woolfolk
Legal Assistant

[Page 110 from transcript of the grievance hearing Hurdle v. DEQ]

* * *

Q Okay. So in that sense he's responsible for quantity, at this time frame 76?
A But if you look back at the performance standards, it doesn't say complete all, send out a letter on every annual report that's assigned for every facility that's assigned to you. It says review and annual report within four hours and meets the technical criteria.

Q So if he was assigned 76 facilities and he only did one, he did it in four hours and did it perfectly, are you telling me that he would have gotten an excellent evaluation?

A Probably not, but it's not the criteria.

Mr. Crowley: That's all I have.

(Line 14-15) **The COMMISSIONER:** <u>There's a flag in every direction.</u>

Ms. Black: That's all I have.

The COMMISSIONER: One question I had, I can't remember what it was now, -- oh, on the four hour business, is it four hours average? In other words is it expected that in some cases he might do an annual report in one hour others might take six, but on average it should be not more that four?

A No, it's not an average that way, it's an average that sometimes it may take you an hour and sometimes it may take you up to four hours, but it should never take you over for hours.

* * *

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality / No. 2001-13

April 3, 2001

The grievant has requested a ruling on whether his November 17, 2000 grievance with the Department of Environmental Quality (DEQ) qualifies for a hearing. In this grievance, the grievant claims that his 2000 performance evaluation is arbitrary, capricious, and retaliatory. For the reasons discussed below, this grievance is consolidated with the grievant's February 14, 2001 grievance (which has automatically qualified for hearing), and both grievances will be heard together by one hearing officer.

FACTS

In September 2000, the grievant received his 1999-2000 performance evaluation with an overall rating of Does Not Meet Expectations. The evaluation consisted of six job elements upon which the grievant's performance was rated. He received a rating of Does Not Meet Expectations in each of the six categories.

On January 16, 2001, the agency terminated the grievant under the Standards of Conduct for alleged poor job performance. On February 14,2001, the

grievant filed a second grievance challenging his performance-based termination as wrongful, unfair, and retaliatory.

This second grievance, which also involves the grievant's September 2000 performance evaluation, has automatically qualified for a hearing. A hearing on this second grievance has not yet been held.

DISCUSSION

This Department has the authority to consolidate grievances on it own accord and does so when consolidation promotes judicial economy and a more comprehensive understanding of the disputed issues. This is such a case. The issue of the grievant's performance is central to both of his grievances. Thus, the factual issues presented by each grievance are significantly intertwined. Indeed, it may be that the first grievance has now been subsumed by the second. In any event, a hearing officer has already been appointed to determine whether the performance-based termination was warranted and appropriate under the circumstances. It is therefore reasonable under the unique circumstances of this case for the hearing officer to review as well the issue of whether the grievant's September 2000 performance evaluation is arbitrary, capricious or retaliatory.

At hearing, with respect to the February 14, 2001 grievance, the agency will have the burden of proving by a preponderance of the evidence, that the February 2001 termination was "warranted and appropriate under the circumstances." The hearing officer may

either uphold, reduce, or rescind the termination. With respect to the November 27, 2000 grievance, the grievant must prove by a preponderance of the evidence that his September 2000 evaluation was arbitrary, capricious, or retaliatory. If the hearing officer so finds, he may direct the agency to redo the September 2000 evaluation on an objective basis related to the performance expectations in the grievant's performance plan. The hearing officer may not substitute his judgment for that of management by ordering that a specific performance rating be given.